Kentucky Law Journal

Volume 57 | Issue 2 Article 7

1968

Torts--Negligence--Negligence Per Se as Proximate Cause of Injury in "Fall-Down" Cases

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more than a civil contract, it is an institution, the social importance of which is evidenced by the existence of state laws to govern its inception and dissolution. Thus in order to protect the institution of marriage the majority of courts would have denied the annulment. However, it should be obvious that greater protection of the institution resulted from the Court's decision granting the annulment. The institution of marriage. This is also true of annulment statutes applied nulment in a case like *Parks* where the marriage has almost no chance of success and would not have taken place but for the fraud of the defendant. Fraud has no place in either a "civil" or "sacred" contract. Every state in the union has enacted divorce laws intended to reflect, satisfy and secure society's demand for the protection of the institution of marriage. This is also true of annulment statutes applied by the courts when, because of considerations of policy, equity and justice, they are the more appropriate remedy. Because society loses by perpetuating marriages under the circumstances of the *Parks* case, the annulment was properly granted.

It is impossible to determine what the significance and impact of this decision will be. However, it is nonetheless significant and may well indicate that a change in society's view and attitude toward marriage is beginning to be reflected in court decisions. Hopefully this decision does indicate the beginning of a trend because it seems to evidence a more enlightened, realistic and humanitarian view of marriage in which there is not only concern for the protection and welfare of the institution but also for the individuals involved. This view not only recognizes the individual's and society's interest in the marital relationship but also their interest that the relationship be happy and successful. Thus, while it may still be necessary in a particular case to protect and defend the institution at the expense of the individuals involved, their interests should be an important consideration in every decision.

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TORTS—NEGLIGENCE—NEGLIGENCE PER SE AS PROXIMATE CAUSE OF INJURY IN "FALL-DOWN" CASES.—Herbert R. Franklin was injured when he lost his footing and fell down a flight of stairs in a building, part of which was leased by Blue Grass Restaurant Co., Inc. The stairway was not equipped with handrails as required by a Lexington city ordinance. Franklin failed to testify as to what caused him to slip, but he did state that as he started to fall he threw out his arms in an

effort to take hold of a banister or handrail. The implication was that if a handrail had been there, he might have been able to avoid the fall and the resultant injuries. The restaurant did not question the charge that its failure to provide handrails was negligence per se. It contended, rather, that the stairway and the absence of handrails were clearly visible to Franklin and that the proximate cause of his injuries was not the absence of handrails, but his own misstep. Under an instruction that Franklin had a right to use the stairway, but that he had a duty to use reasonable care in traversing the stairs, the jury found him free of negligence and awarded him a verdict. The restaurant appealed. *Held*: The failure to comply with the ordinance was a proximate cause of the injury. The jury's finding with respect to Franklin's alleged contributory negligence was not clearly erroneous and therefore must be sustained.[1] *Blue Grass Restaurant Co. v. Franklin*, 424 S.W.2d 594 (Ky. 1968).

It is a long-settled maxim in Kentucky tort law that the violation of a municipal ordinance is negligence per se if the injured party was a member of a class of persons intended to be protected by the ordinance and the injury was the type the ordinance was designed to prevent.[2] It is also well settled, however, that for such negligence to be actionable, it must be the proximate cause of the injury sustained.[3] The Kentucky Court of Appeals, like most other courts, has been hard-pressed to accurately define "proximate cause." Perhaps the most concise statement of Kentucky law in this regard was formulated by the Federal District Court for the Eastern District of Kentucky in

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[1] The appeal was also based on a separate issue concerning the landlord/tenant relationship between the restaurant and Eastman Investment Company, which owned the building where the restaurant and stairs were located. Blue Grass also lost on this issue due to the existence of an indemnifying clause in the lease.

[2] For a comprehensive discussion of the development of the negligence per se doctrine in Kentucky, see Kepner, *Violation of a Municipal Ordinance as Negligence Per Se in Kentucky*, 37 Ky. L.J. 358 (1949). For a more condensed study of this subject, see Note, *Torts—A Summary and Critique of the Law of Statutory Negligence in Kentucky*, 38 Ky. L.J. 479 (1950).

[3] Illinois C. Ry. v. Swift, 233 F. 2d 766 (6th Cir. 1966); Home Ins. Co. v. Hamilton, 253 F. Supp. 752 (E.D. Ky. 1966); Marmor v. Marmor, 409 S.W.2d 526 (Ky. 1966); Nett v. Zellars, 353 S.W.2d 379 (Ky. 1962); Mountain Petroleum Co. v. Howard, 351 S.W.2d 178 (Ky. 1961); Milliken v. Union Light, Heat & Power Co., 341 S.W.2d 261 (Ky. 1960); Ross v. Jones, 316 S.W.2d 845 (Ky. 1958); Commonwealth v. Ragland Potter Co., 305 S.W.2d 915 (Ky. 1957); Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955); Greyhound Terminal v. Thomas, 307 Ky. 44, 209 S.W.2d 478 (1948); Brown Hotel Co. v. Levitt, 306 Ky. 804, 209 S.W.2d 70 (1948); Phoenix Amusement Co. v. Padgett's Adm'x, 301 Ky. 338, 192 S.W.2d 105 (1946); Murphy v. Homans, 286 Ky. 191, 150 S.W.2d 14 (1940); Myers v. Salyer, 277 Ky. 696, 127 S.W.2d 158 (1939); Pryor's Adm'r v. Otter, 268 Ky. 602, 105 S.W.2d 564 (1937); Wright v. Clausen, 263 Ky. 298, 92 S.W.2d 93 (1936).

Home Ins. Co. v. Hamilton,[4] wherein, after sifting through the applicable Kentucky cases, the court concluded:

> The Kentucky Court of Appeals defines the proximate cause of an injury as that which in natural and continuous sequence, unbroken by any independent responsible cause, produces injury. . . . It must be such that it induced the injury and without which the accident could not have occurred. . . .[5]

In Kentucky, proximate cause is a question of fact and will be left to the jury unless the facts are not only undisputed, but the inference to be drawn from them is such that fair-minded men ought not to differ about them.[6] Juries, however, are not permitted to speculate as to proximate cause but must base their decisions on competent evidence presented at trial.[7] Circumstantial evidence may suffice to prove proximate cause, but the circumstances must preclude a reasonable inference that the accident could have been caused in any other manner.[8] The requirement of proximate cause precludes recovery where the negligence merely created a condition which makes it possible for an injury to occur through some independent cause.[9] It has been said, ". . . [N]egligence does not cause accidents. . . .[It] creates the conditions out of which they arise."[10] But if the subsequent act of another "grows out of and naturally flows from the condition," it is not an independent force or intervening cause.[11] Although foreseeability is an aspect to be considered, it is not necessary that the negligent party foresee the specific subsequent act in the chain of causation.[12] Contributory negligence, of course, is a bar to recovery in actions growing out of negligence per se just as in other negligence cases;[13] but it would be a fallacy to say that evidence of contributory negligence has been given as much weight in such cases as in cases where the original negligence grew out of something other than a

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[4] 253 F. Supp. 752 (E.D. Ky. 1966).

[5] *Id.* at 756.

[6] Home Ins. Co. v. Hamilton, 253 F. Supp. 752 (E. D. Ky. 1966); Jewell v. Dell, 284 S.W.2d 92 (Ky. 1955); Murphy v. Homans, 286 Ky. 191, 150 S.W.2d 14 (1940); Stevens' Adm'r v. Watt, 266 Ky. 608, 99 S.W.2d 753 (1937); Louisville & N.R.R. v. Cooper, 164 Ky. 489, 175 S.W. 1034 (1915).

[7] Phoenix Amusement Co. v. Padgett's Adm'x, 301 Ky. 338, 192 S.W.2d 105 (1946).

[8] *Id.*

[9] Milliken v. Union Light, Heat & Power Co., 341 S.W.2d 261 (Ky. 1960); Brown Hotel Co. v. Levitt, 306 Ky. 804, 209 S.W.2d 70 (1948).

[10] United Fuel Gas Co. v. Thacker, 372 S.W.2d 784, 786 (Ky. 1963).

[11] Seelbach v. Cadick, 405 S.W.2d 745, 749 (Ky. 1966).

[12] *Id.*; United Fuel Gas Co. v. Thacker, 372 S.W.2d 784 (Ky. 1963).

[13] Durham v. Maratta, 302 Ky. 633, 195 S.W.2d 277 (1946); Rodgers v. Stoller, 284 Ky. 108, 143 S.W.2d 1047 (1940); Louisville & N.R.R. v. Cooper, 164 Ky. 489, 175 S.W. 1034 (1915).

violation of statutory duty.[14] The apparent reason for this is that in many negligence per se cases, the statute or ordinance violated was intended to protect individuals from their own carelessness in certain dangerous situations.[15]

The Kentucky decisions in so-called "fall-down" cases involving negligence per se, such as we have in *Blue Grass Restaurant,* have generally followed the principles just outlined.[16] In *Rodgers v. Stoller,*[17] the plaintiff fell down a flight of stairs while attempting to walk down an unlighted hallway in the apartment building where she lived. A city ordinance required that such hallways be lighted. The Court held that the plaintiff was not contributorily negligent as a matter of law even though she knowingly entered a place of danger, reasoning that although she had a duty to exercise due care for her own safety, she was not required to use the hall at night at her own peril. This case was followed by three fall-down cases not involving negligence per se, but providing some guidance with regard to the question of proximate cause. In *Seelbach, Inc. v. Mellman*[18] and *Tate v. Canary Cottage,*[19] the respective plaintiffs were found contributorily negligent for not using the provided handrails even though they were aware of the dangerous conditions created by the negligent acts of the defendants. In *Phoenix Amusement Co. v. Padgett's Adm'x,*[20] recovery was denied because there was no proof that the decedent had stumbled at the exact spot where the defendant's negligence had created a dangerous condition, and because there was conflicting evidence as to whether death had resulted from the fall or from injuries suffered at the hands of an unknown assailant several weeks earlier.

Durham v. Maratta,[21] decided in 1946, is the most significant Kentucky case dealing with negligence per se and proximate cause in fall-down situations, primarily because of the language used therein. The plaintiff was injured while descending stairs which were not properly lighted as required by city ordinance. At trial, she was ruled contributorily negligent as a matter of law. The Court of Appeals reversed

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[14] *Cf.* Home Ins. Co. v. Hamilton, 253 F. Supp. 752 (E.D. Ky. 1966); Greyhound Terminal v. Thomas, 307 Ky. 44, 209 S.W.2d 478 (1948); Durham v. Maratta, 302 Ky. 633, 195 S.W.2d 277 (1946); Rodgers v. Stoller, 284 Ky. 108, 143 S.W.2d 1047 (1940).

[15] *Cf.* Greyhound Terminal v. Thomas, 307 Ky. 44, 209 S.W.2d 478 (1948); Rodgers v. Stoller, 284 Ky. 108, 143 S.W.2d 1047 (1940).

[16] It is interesting to note that prior to the appeal in *Blue Grass Restaurant,* the Court had not been faced with a fall-down case since 1948. The seven cases discussed *infra* in the text were all decided between 1940 and 1948.

[17] 284 Ky. 108, 143 S.W.2d 1047 (1940).

[18] 293 Ky. 790, 170 S.W.2d 18 (1943).

[19] 302 Ky. 313, 194 S.W.2d 663 (1946).

[20] 301 Ky. 338, 192 S.W.2d 105 (1946).

[21] 302 Ky. 633, 195 S.W.2d 277 (1946).

holding that she had a right to descend the steps even though she knew it was dark, and that it was for the jury to determine whether she was contributorily negligent. Citing *Ruling Case Law*,[22] the Court's precise words were:

> If the injury complained of is one which was intended to be prevented by the Statute and Ordinance . . . the violation of their provisions must be considered as the proximate cause of the injury. . . . There can be no question that the Statute and Ordinance above quoted were intended to prevent a person using steps in an apartment house from falling in the darkness.[23]

It is difficult to see how the Court could have made a more unambiguous statement in regard to the law on this point. *Durham* was explicitly followed in *Greyhound Terminal v. Thomas*.[24] There, the plaintiff's shoe caught in "something" which caused her to stumble and fall down the steps. She, like Mr. Franklin, reached for a handrail only to find that none had been provided. In finding for the plaintiff, the Court quoted the above passage from *Durham*.

But *Durham*, despite the language used therein, apparently did not impose absolute liability on the negligent party in fall-down cases. It should not be forgotten that the Court there did imply that a jury finding of contributory negligence would be a defense; and in *Brown Hotel Co. v. Levitt*,[25] decided within a few months of *Greyhound Terminal*,[26] the Court recognized yet another defense in these cases. The plaintiff, while traversing a set of stairs on which no handrails were provided, fell after being struck from behind by an unidentified person, who apparently (and coincidentally) was also in the process of falling down the stairs. In finding for the defendant, the Court cited Judge Cardozo's opinion in *DeHaen v. Rockwood Sprinkler Co.*:[27]

> Liability is not established by a showing that as chance would have it a statutory safeguard *might have* avoided the particular hazard out of which an accident ensued. The hazard out of which an accident ensued must have been the particular hazard or class of hazards that the statutory

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[22] 20 R.C.L. 43 (1918).
[23] 302 Ky. at 635, 195 S.W.2d at 279.
[24] 307 Ky. 44, 209 S.W.2d 478 (1948).
[25] 306 Ky. 804, 209 S.W.2d 70 (1948).
[26] The dissenting opinion in *Blue Grass Restaurant* argued that the Court should have followed *Brown Hotel* because it was decided on January 23, 1948 whereas *Greyhound Terminal* was decided on November 18, 1947. The dissenting judges no doubt have access to information which is unavailable to this writer. It should be noted, however, if only for the sake of argument, that January 23, 1948 was the date *Brown Hotel* was *published*. *Greyhound Terminal* was *published* on March 26, 1948.
[27] 258 N.Y. 350, —, 179 N.E. 764, 766 (1932).

> safeguard in the thought and purpose of the Legislature was intended to correct. (Emphasis added.)[28]

Although the plaintiff in *Brown Hotel* testified that if there had been a railing she could have taken hold of it, the Court rejected this contention because at the time she was struck, her husband was right beside her and she failed to take hold of him.

The Court in *Blue Grass Restaurant* relied on the decisions in *Durham* and *Greyhound Terminal* and quoted from *Durham* the passage which that Court had adopted from *Ruling Case Law*.[29] The Court emphasized the fact that there was no contention on the part of the restaurant that its failure to provide the handrails was not negligence per se, that Mr. Franklin testified that he had reached for a handrail, and that the evidence was sufficient to support a jury finding that Franklin was free from negligence.

The dissent argued that there was nothing particularly dangerous about those steps and that since Mr. Franklin didn't know exactly what caused him to fall, he should be held contributorily negligent as a matter of law. *Brown Hotel* was cited as a more preferable precedent for this case than *Greyhound Terminal*.[30]

The precise holding of the Court was:

> The ordinance which was violated was intended to prevent the injury which Franklin sustained, therefore, the failure to comply must be considered a proximate cause. Greyhound Terminal of Louisville v. Thomas, *supra*.[31]

Although the Court cited *Greyhound Terminal* in making this statement, it should be noted that instead of referring to the negligence as *the* proximate cause, as was done in both *Durham*[32] and *Greyhound Terminal*,[33] the Court here referred to the negligence as *a* proximate cause. It must be assumed that this variance in articles was intentional and was a recognition that in this type of case more than one proximate cause might exist. Although this would seem precluded by the common law definition of proximate cause in Kentucky, it is apparently not an unknown concept. At least one authority, concerning the presence of negligence per se in fall-down cases, states: ". . .

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[28] 306 Ky. at 808, 209 S.W.2d at 72 It is difficult to tell whether the Court cited this quotation from Judge Cardozo to prove that the defendant's negligence was not the proximate cause of plaintiff's injuries because of the existence of an intervening force, or to prove that the failure to provide handrails was not negligence per se because the injury suffered was not within the contemplation of the ordinance.

[29] 424 S.W.2d at 597.

[30] *Id.* at 599-600.

[31] *Id.* at 597.

[32] 302 Ky. at 635, 195 S.W.2d at 279.

[33] 307 Ky. at 46, 209 S.W.2d at 479.

[W]hether or not an innkeeper's violation of such regulations imposes liability for injuries to a guest depends upon whether the absence of such handrails constitutes *one of the proximate causes* of the falling and injury."[34] (Emphasis added.) This commentator does not discuss what other possible causes might constitute "one of the proximate causes." Neither does the *Blue Grass Restaurant* opinion indicate what other factor, if found, might have been "a proximate cause." The implication, however, is that if Mr. Franklin had been found contributorily negligent, that would have been a proximate cause— one which under existing Kentucky law would have barred recovery.[35] At any rate, if the assumption now made as to the wording of the holding in this case is correct, *Blue Grass Restaurant* may be foretelling a change in Kentucky law regarding causation—if nothing else, it further confuses the definitional distinctions between causes and proximate causes.

If the assumption is incorrect, there can still be no quarrel with the result of the case. The Kentucky law as expressed in *Durham* and *Greyhound Terminal,* and as followed in *Blue Grass Restaurant,* is in tune with the generally accepted maxim that when a statute or ordinance designed for the safety of a specific class of individuals is violated, the violator must accept responsibility for any resulting injury to an innocent person which was within the legislative contemplation.[36] Professor Prosser goes so far as to say that even when there is an intervening cause combining with the defendant's conduct to produce the result, the defendant will be held liable because his negligence consists in the failure to protect the plaintiff against that very risk—and cites cases from various jurisdictions in support of that position.[37] He does, however, recognize that there are legitimate defenses to an action involving negligence per se.[38] And so, apparently, does Kentucky law. The implication in *Blue Grass Restaurant* was that

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[34] Annot., 58 A.L.R. 2d 1195 (1958).

[35] Kentucky has no comparative negligence statute.

[36] *See* 38 AM. JUR. *Negligence* § 166 (1941) for the following:

> If the injury complained of is a natural and probable consequence of a violation of the statute, then that violation is correctly taken as the proximate cause of the injury. If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the nonobservance of the law . . .

And *see* 65 C.J.S. *Negligence* § 105 (1966), which states:

> The essence of proximate cause in cases involving the violation of statutes is whether the risk and harm encountered fall within the scope of the protection of the statute. . . . The negligent violation of a statutory standard of care is usually the proximate cause of injury if the accident occurring is the accident which the statute is designed to prevent.

[37] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 51 (3d ed. 1964).

[38] *Id.* at § 35.

if Mr. Franklin had been found contributorily negligent, he would have been barred from recovery just as were the plaintiffs in *Seelbach, Inc. v. Mellman*[39] and *Tate v. Canary Cottage.*[40] Nor is there any reason to believe that *Blue Grass Restaurant* in any way overruled *Brown Hotel* in which the accident causing the injury was held not to have been within the contemplation of the ordinance violated. Rather, it must be said that the Court in *Blue Grass Restaurant* merely followed existing Kentucky law as applied to its facts. Any criticism must be directed at the unfortunate choice of words used in the one-sentence holding, which, if taken out of context from the rest of the opinion, would seem to imply that absolute liability was imposed.

William S. Cooper

WORKMEN'S COMPENSATION—"ARISING OUT OF" REQUIREMENT—OPERATING PREMISES.—Plaintiff was employed in a hospital and covered by the Kentucky Workmen's Compensation Act. She fell and was injured one morning while walking toward the hospital from the hospital parking lot where she had parked her car. The Workmen's Compensation Board denied her claim for compensation and plaintiff appealed to the Harlan County Circuit Court. The decision was reversed by the Circuit Court and the Board appealed to the Kentucky Court of Appeals. *Held*: Affirmed. The parking lot was a part of the employer's operating premises and the injury was therefore compensable. *Harlan Appalachian Regional Hospital v. Taylor,* 424 S.W.2d 580 (Ky. 1968).

Kentucky's Workmen's Compensation Act requires that a compensable injury arise "out of *and* in the course of . . . [the employee's] employment."[1] (Emphasis added) The development of this dual requirement, as interpreted by the Kentucky Court of Appeals, has followed a definite pattern.

The initial arise "out of" requirement has historically been linked with causation and has been the primary test. In fact the second requirement of arising "in the course of his employment" was often dependent upon the first.[2] In parking lot situations similar to that in

[39] 293 Ky. 790, 170 S.W.2d 18 (1943).
[40] 302 Ky. 313, 194 S.W.2d 663 (1946).

[1] KY. REV. STAT. [hereinafter cited as KRS] § 342.005(1) (1962).
[2] In considering the principle behind the exceptions to the premises rule, Larson says "in this instance, as in many others, the concept of 'course of employment' follows that of 'arising out of employment'; that is, the employment-connected risk is first recognized, and then a course-of-employment theory must be devised to permit compensation for that obviously occupational risk." 1 LARSON, WORKMEN'S COMPENSATION LAW [hereinafter cited as LARSON] § 15.15 (1965).